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4 **UNITED STATES DISTRICT COURT**
5 **DISTRICT OF NEVADA**
6

7 WYNN LAS VEGAS, LLC,

8 Plaintiff,

9 vs.

10 CIGAR ROW, LLC,

11 Defendant.
12

2:15-cv-01079-RJC-CWH

ORDER

13 This case arises from an alleged breach of contract between a wholesale vendor of
14 tobacco products and its vendee. Now pending before the Court is Wynn's Motion to Dismiss
15 Cigar Row's amended counterclaim. (ECF No. 43.) For the reasons given herein, the Court
16 grants the motion.

17 **I. FACTS AND PROCEDURAL HISTORY**

18 The facts underlying this case have been detailed in the Court's prior orders, and need not
19 be revisited at length here. (*See* ECF Nos. 37, 41.)

20 In brief, Wynn filed this action alleging Cigar Row breached its contract with Wynn by
21 failing to obtain a license to operate in Nevada and failing to collect and remit \$136,008.99 in
22 "other tobacco products" ("OTP") taxes. As a result of Cigar Row's breach, Wynn was
23 ultimately forced to pay the OTP taxes to the State. (*See* July 10, 2014 Email from Michael P.
24 Kelly, ECF No. 22 at 175–76; Lawrence Decl. ¶ 4, ECF No. 22 at 184; Check, ECF No. 22 at

1 186.) On November 28, 2016, the Court granted summary judgment in Wynn’s favor on the
2 breach of contract claim, the effect of which was to award Wynn damages in the amount of OTP
3 tax assessment. (Order, ECF No. 37.) On January 4, 2017, the Court permitted Cigar Row to file
4 an amended counterclaim, on the basis that under N.R.S. 370.450(3), OTP taxes “must be
5 collected and paid by the wholesale dealer” Therefore, Cigar Row had an obligation to
6 collect OTP taxes *from Wynn*, and under the standard contractual relationship Wynn would have
7 had to pay the disputed taxes anyway. Accordingly, the Court observed that “the ultimate just
8 result may be that Cigar Row owes Wynn nothing, or at least less than the full amount claimed
9 by Wynn.” (Order 4–5, ECF No. 41.)

10 Cigar Row’s amended counterclaim was thus filed, alleging one cause of action for
11 collection of OTP tax pursuant to N.R.S. 370.450. (ECF No. 42.) Wynn now moves to dismiss
12 the counterclaim under Rule 12(b)(6). (Mot. Dismiss, ECF No. 43.)

13 **II. LEGAL STANDARDS**

14 Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the
15 claim showing that the pleader is entitled to relief” in order to “give the defendant fair notice of
16 what the . . . claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47
17 (1957). Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action
18 that fails to state a claim upon which relief can be granted. A motion to dismiss under Rule
19 12(b)(6) tests the complaint’s sufficiency. *See N. Star Int’l v. Ariz. Corp. Comm’n*, 720 F.2d 578,
20 581 (9th Cir. 1983). When considering a motion to dismiss under Rule 12(b)(6) for failure to
21 state a claim, dismissal is appropriate only when the complaint does not give the defendant fair
22 notice of a legally cognizable claim and the grounds on which it rests. *See Bell Atl. Corp. v.*
23 *Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint is sufficient to state a
24 claim, the court will take all material allegations as true and construe them in the light most

1 favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). The
2 court, however, is not required to accept as true allegations that are merely conclusory,
3 unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden State*
4 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

5 A formulaic recitation of a cause of action with conclusory allegations is not sufficient; a
6 plaintiff must plead facts pertaining to his own case making a violation “plausible,” not just
7 “possible.” *Ashcroft v. Iqbal*, 556 U.S. 662, 677–79 (2009) (citing *Twombly*, 550 U.S. at 556)
8 (“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to
9 draw the reasonable inference that the defendant is liable for the misconduct alleged.”). That is,
10 under the modern interpretation of Rule 8(a), a plaintiff must not only specify or imply a
11 cognizable cause of action (*Conley* review), but also must allege the facts of his case so that the
12 court can determine whether the plaintiff has any basis for relief under the cause of action he has
13 specified or implied, assuming the facts are as he alleges (*Twombly-Iqbal* review).

14 “Generally, a district court may not consider any material beyond the pleadings in ruling
15 on a Rule 12(b)(6) motion. However, material which is properly submitted as part of the
16 complaint may be considered on a motion to dismiss.” *Hal Roach Studios, Inc. v. Richard Feiner*
17 *& Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citation omitted). Similarly, “documents whose
18 contents are alleged in a complaint and whose authenticity no party questions, but which are not
19 physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to
20 dismiss” without converting the motion to dismiss into a motion for summary judgment. *Branch*
21 *v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Moreover, under Federal Rule of Evidence 201, a
22 court may take judicial notice of “matters of public record.” *Mack v. S. Bay Beer Distribs., Inc.*,
23 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court considers materials outside
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1 of the pleadings, the motion to dismiss is converted into a motion for summary judgment. *See*
2 *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001).

3 **III. ANALYSIS**

4 Having now allowed Cigar Row to amend its pleading, and given proper consideration to
5 the counterclaim, the Court will grant Wynn’s motion to dismiss. Cigar Row has failed to state a
6 cognizable claim to collect the disputed taxes.

7 The statutory scheme governing the Nevada OTP tax is found at N.R.S. 370.440–
8 370.503. These statutes impose a thirty percent tax upon the purchase or possession of other
9 tobacco products by a customer in Nevada, to be levied on the wholesale price of such products.
10 N.R.S. 370.450. Under the definitions provided in the statutes, Wynn is a “retail dealer,” and
11 Cigar Row is a “wholesale dealer.” N.R.S. 370.440(3), (6). Both retail and wholesale dealers
12 must be licensed through the Department of Taxation before engaging in business as dealers in
13 Nevada. N.R.S. 370.441(2). However, the actual duty to remit OTP tax is imposed solely on
14 wholesale dealers. N.R.S. 370.450(3). Under Section 370.450, wholesale dealers are subject to
15 two independent statutory obligations: first, *to collect* the necessary OTP tax, and second, *to pay*
16 the tax to the State. *Id.* Furthermore, when the statutory scheme is considered as a whole, it
17 becomes clear that the Nevada Legislature intended that wholesale dealers—as opposed to retail
18 dealers—would pay the OTP tax. For example, criminal penalties for failure to pay OTP tax are
19 applicable only to wholesale dealers. N.R.S. 370.450(4). And it is only wholesale dealers who
20 may claim tax credits “for other tobacco products on which the tax has been paid . . . and that
21 may no longer be sold.” N.R.S. 370.490(1), (3).

22 Here, there was a failure to collect and pay on the part of Cigar Row—this is why the
23 parties are in litigation. Cigar Row clearly did not comply with the aforementioned statutes.
24 However, this is not to say that Cigar Row’s failure to collect and pay the taxes wholly absolves

1 Wynn of all responsibility for the payment of OTP tax on the products it purchased from Cigar
2 Row. The OTP tax statutes make it “unlawful for any person to sell or offer to sell other tobacco
3 products on which the tax is not paid.” N.R.S. 370.460. Therefore, even though it is the
4 wholesale dealer’s obligation to collect and remit the taxes, retail dealers also have an obligation
5 to ensure that the necessary taxes have been paid on any other tobacco products they sell.

6 Moreover, it is important to note that the OTP tax is imposed “on the *purchase or*
7 *possession* of other tobacco products by a customer” in Nevada. N.R.S. 370.450(1). In this
8 respect, the OTP tax is very similar to a general sales and use tax, imposed at wholesale rather
9 than retail. Under Nevada law, the burden of paying a sales tax falls on the buyer. *See, e.g.*,
10 N.R.S. 372.110 (“The tax hereby imposed shall be collected by the retailer from the consumer
11 insofar as it can be done.”); *see also United States v. Nevada Tax Comm’n*, 291 F. Supp. 530,
12 533 (D. Nev. 1968), *aff’d*, 439 F.2d 435 (9th Cir. 1971) (holding that the “incidence of the
13 Nevada Sales Tax” falls on the buyer, not the seller); 1995 Nev. Op. Att’y Gen. 76 (1995) (the
14 purchaser “bears the legal obligation to remit the sales tax”). The OTP tax as well is meant to be
15 “collected” by the wholesale dealer, i.e., collected *from the buyer*. After all, it is the customer’s
16 *purchase* of the products that is taxed, so it would seem that the ultimate tax burden must fall on
17 the *purchaser*.

18 The Nevada Supreme Court case of *Campbell v. Nevada Tax Comm’n*, 853 P.2d 717
19 (Nev. 1993), is instructive. In *Campbell*, plaintiffs were residents of both Oregon and Nevada.
20 Plaintiffs purchased a car from a licensed dealer in Reno, and “executed an affidavit declaring
21 that the car would be removed from Nevada within fifteen days and would not thereafter be used
22 or stored in Nevada.” On the basis of the affidavit, the dealer did not assess Nevada sales tax on
23 the car at the time of the purchase. *Id.* at 718. Several months later, plaintiffs were driving their
24 car in Nevada when “a Nevada Highway Patrol officer spotted the car with Oregon plates,

1 identified its owners as Nevada residents, and began proceedings against” plaintiffs. *Id.* “The
2 Nevada Department of Taxation later assessed a tax deficiency against [plaintiffs] of
3 \$13,505.71.” *Id.*

4 In the civil action challenging that tax assessment, the Nevada Supreme Court observed:
5 “Unless exemptions from [the] general provisions apply, sales tax is owed *upon the purchase* of
6 tangible personal property in Nevada,” and it is the *taxpayer* who “bears the burden of proving
7 that he is entitled to [an] exemption.” *Id.* at 719–20 (emphasis added). Accordingly, because
8 plaintiffs were unable to show that an exemption from sales tax applied to the purchase of their
9 car, the tax assessment against them was affirmed. *Id.* at 720–21. The Nevada Supreme Court’s
10 analysis in *Campbell* confirms that the ultimate burden to pay Nevada sales tax is imposed on the
11 buyer of the products sold and not the seller.

12 However, the facts of this case are distinguishable. This is not an action to assess unpaid
13 taxes brought by the State tax authority; that ship sailed when the State assessed the outstanding
14 OTP taxes against Wynn. Rather, broadly speaking, this action was brought to enforce the terms
15 of an agreement between private parties. In the context of a typical wholesale transaction of other
16 tobacco products, as in the general retail context, the costs of applicable sales tax will be
17 provided for at the time of the transaction under a private agreement between the parties. For
18 instance, at the checkout counter an item of clothing will ring up at the sticker price *plus tax*—a
19 total purchase price which the buyer can reject, thereby denying the offer, or accept, thereby
20 completing the sale contract. Here, Wynn and Cigar Row bargained at arm’s length regarding
21 contract terms, including pricing. Cigar Row then sold other tobacco products to Wynn at the
22 contract prices, and Wynn paid Cigar Row’s invoices in full. At no point during the parties’
23 contract did Cigar Row attempt to collect OTP taxes from Wynn. Accordingly, the Court has
24 ruled that Cigar Row’s failure to obtain a Nevada license and to collect and pay OTP taxes

1 constituted a breach of its contract with Wynn. (*See* Order 5–9, ECF No. 37.) Wynn suffered
2 damages when it was required to pay those taxes to the Department of Taxation.

3 Now, Cigar Row has not identified any theory that would allow it to offset the damages it
4 must pay to Wynn. The Court agrees with Wynn that there is no private right of action for
5 violations of N.R.S. 370.440–370.503. *See, e.g., Richardson Constr., Inc. v. Clark Cnty. School*
6 *Dist.*, 156 P.3d 21, 23 (Nev. 2007) (“[W]hen a statute does not expressly provide for a private
7 cause of action, the absence of such a provision suggests that the Legislature did not intend for
8 the statute to be enforced through a private cause of action.”). If a dealer of other tobacco
9 products fails to comply with any provisions of the statutes, it is the Attorney General or the
10 district attorney who may “investigate and prosecute any civil or criminal violation.” N.R.S.
11 370.530(1). The purpose of the statutory scheme is to ensure the correct taxes are paid to the
12 State; here, the State has already settled its tax claim with Wynn. In contrast, if private parties
13 have a dispute over who bears the burden of an OTP tax assessment, the appropriate vehicle for
14 resolving that dispute would sound in contract, or perhaps in equity. Cigar Row has specifically
15 opted not to allege that Wynn breached any agreement between them, and has instead only
16 asserted a claim under the very statutory provision which imposed the obligation *on Cigar Row*
17 to collect and remit OTP taxes; the very provision Cigar Row failed to comply with. (Resp. 10,
18 ECF No. 49.)

19 Therefore, Cigar Row has failed to identify any cognizable basis for its counterclaim
20 against Wynn.

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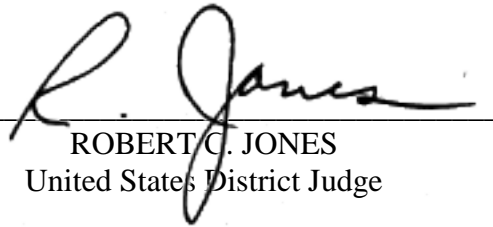
1 **CONCLUSION**

2 IT IS HEREBY ORDERED that the Motion to Dismiss (ECF No. 43) is GRANTED,
3 without leave to amend.

4 The Clerk of the Court shall enter judgment in favor of Wynn and close the case.

5 IT IS SO ORDERED.

6 DATED: This 13th day of April, 2017.

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8 
9 ROBERT C. JONES
United States District Judge